

SECRETARY OF LABOR  
WASHINGTON, D.C.

IN THE MATTER OF  
TERRY O'BOYLE,  
COMPLAINANT.

DECISION AND ORDER TO SHOW CAUSE

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981), 1/ and regulations promulgated thereunder at 20 C.F.R. Parts 675-680 (1990). The subgrantee, Illinois Department of Corrections (IDOC), filed exceptions to that part of the Decision and Order (D. and O.) of Administrative Law Judge (ALJ) Arline Pacht, holding that IDOC was required to follow the grantee's procedures providing for prior notice and an opportunity to be heard before dismissing CETA participant Terry O'Boyle from employment. IDOC also challenged the ALJ's backpay order as contrary to state law, which requires such awards to be paid from special appropriations.

The grantee, Illinois Department of Commerce and Community Affairs (IDCCA), did not object to the backpay award, but did

1/ CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ X01-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

except to the **ALJ's** order that if the award is not paid within twenty days, all CETA funding to IDCCA and IDOC would be revoked. **IDCCA** asked that the **ALJ's** order be modified to allow six to nine months to obtain the appropriation necessary to comply with the backpay award. The Grant Officer excepted to the **ALJ's** refusal to **assess** interest on the backpay. The case was accepted for **review in** accordance with the provisions of 20 C.F.R. § 676.91(f).

#### BACKGROUND

Complainant, Terry **O'Boyle**, was hired by IDOC on December 12, 1977, as a recreation worker at the Meynard Correctional Center. He became a probationary employee on January 11, 1978, and would **have** attained certified status under the Illinois civil service system on July 11, 1978. Transcript (T.) at 169; D. and O. at 3.

On June 9, 1978, Complainant was advised by his supervisor that his employment was being terminated and he would no longer **be** permitted access to the prison facility. He later received a six month evaluation form with notice of his discharge for unsatisfactory performance. **Id.**; Grant Officer's Exhibit (G.O. Ex.) 1, **Atch.** 2-A. Complainant's pay also was terminated the same day, T. at 87, 128, 177; D. and O. at 3, and he received notice on June 14, 1978, from the Illinois Department of Personnel that his formal discharge was effective on June 19, 1978. **Id.**; G.O. Ex. 1, **Atch.** 5-A.

Complainant responded to the discharge by filing a written grievance on June 26, 1978, with the Director for the Jackson

County Board, program agent for the grantee. D. and O. at 3-4; G.O. Ex. 1, Atchs. 5-C, D. The Jackson County Board held a hearing on March 22, 1979, and, in a report dated March 27, 1979, concluded that Complainant's grievance had merit and he was therefore improperly discharged from his employment. G.O. Ex. 1, **Atch.** 5-L. On April 25, 1979, the Governor's Office of Manpower and Human Development issued a Notice of Final Action affirming the Jackson County Board's determination that Complainant's termination was substantively improper. It also found that the discharge was procedurally deficient in that Complainant was not given five days in which to respond before being released as required by applicable CETA rules and regulations. D. and O. at 4-5; G.O. Ex. 1, **Atch.** 5-M. IDOC appealed the Notice of Final Action and the Grant Officer, in a Final Determination dated June 28, 1979, reversed, concluding that no evidence was developed to indicate that Complainant's discharge violated the Illinois state personnel rules, the Act, or the CETA regulations. G.O. Ex. 3.

In reversing the Grant Officer's determination, the **ALJ** noted that under 29 C.F.R. § 98.26(a) (1979) a grantee must establish procedures to govern the resolution of any issue which may arise between the grantee, its subgrantees and the CETA participant. D. and O. at 6. Further, if the issue involved an adverse action, the grantee had to assure that the procedures guaranteed written notice and an opportunity to respond. D. and O. at 7. The **ALJ** then acknowledged that IDCCA, the grantee here,

had established the required procedures in a handbook entitled "**CETA Grievance Procedures.**" The handbook required that a **CETA** participant be given five working days to respond to a proposed adverse action. **Id.**

The **ALJ** recognized that Section 98.26(a) did not require notice and an opportunity to respond prior to adverse action, <sup>2/</sup> but concluded that the grantee's procedures mandating prior notice were not inconsistent with the regulation. D. and O. at 8. She concluded that Complainant's discharge, as a practical matter, occurred on June 9 when he was barred from the prison facility and his wages ceased. In a technical sense, she found that **IDOC** provided Complainant with more than five days notice as required by the grantee's procedures because the discharge did not become final until ten days later. **Id.** The **ALJ** concluded, however, that Complainant was not given the requisite opportunity to respond. D. and O. at 9-10.

To remedy this violation, the **ALJ** ordered that: (1) Complainant be reinstated in the same or similar position as a probationary employee with one month remaining before becoming eligible for certification: (2) all adverse comments in his personnel file be expunged: (3) backpay less interim earnings be paid Complainant from June 9, 1978, until reinstatement is

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<sup>2/</sup> Prior to its amendment in 1976, Section 98.26(a) stated in relevant part "[w]hen the prime sponsor or eligible applicant proposes to take adverse action ...." The regulation in effect at the time of the hearing stated "[w]hen the prime sponsor or eligible applicant takes an adverse action . . . ." 29 C.F.R. § 98.26(a) (1979).

formally offered; (4) backpay not be paid directly or indirectly with CETA funds; and (5) failure to comply with the reinstatement and backpay orders within twenty days would result in the revocation of CETA funding to IDCCA and IDOC. D. and O. at 14, 15. The ALJ denied interest on the backpay award, citing an absence of authority.

### DISCUSSION

#### I. Complainant's Discharge.

IDOC contends that it was not obliged to follow the grantee's grievance procedures because, by requiring that CETA participants have an opportunity to respond before adverse action is taken, the procedures are contrary to the provisions of Section 98.26(a). IDOC Exception at 2. As IDOC argues, Section 98.26(a) as amended does not require that CETA participants be given an opportunity to be heard prior to adverse action. It does not follow, however, that grantees are precluded from including such a provision in the grievance procedures they are required to establish.

The comments accompanying the amended Section 98.26(a) state that **"the** language was revised to allow for complaint procedures which notify participants in writing at the same time as the adverse action is **taken.**" 41 Fed. Reg. 26,338 (1976) (emphasis added). By using the word **"allow,"** the drafters of Section 98.26(a) plainly intended that grantees have the discretion to establish procedures which either required or did not **require** opportunity to be heard before adverse action was taken against

**CETA** participants. I therefore reject the contention that **IDCCA's** grievance procedures are contrary to Section 98.26(a) and hold that IDOC was required to follow them when it terminated Complainant's employment. Inasmuch as IDOC failed to follow the grievance procedures, the **ALJ's** finding that Complainant was improperly discharged should be affirmed.

In addition to the procedural violation, the record supports the conclusion of the Jackson County Board and the Governor's Office of Manpower and Human Development that Complainant's discharge was not substantively justified. See G.O. Ex. 1, Atchs. 5-L, M. Complainant's discharge was predicated on an evaluation report which stated that Complainant did not meet his job objectives in six of eight areas. G.O. Ex. 1, **Atch.** 2-A. After filing his grievance, however, Complainant provided the **Director** of the Jackson County Board with records and several memoranda to refute the statements in the evaluation report. Complainant's Exhibits **2C**, D, E, F, G and 4B. At no time during the grievance process did IDOC cooperate by providing the basic information needed to resolve the grievance, see G.O. Ex. 1, Atchs. 5-H, L and M, and IDOC offered no reasons for its failure to do so. Furthermore, representatives of IDOC failed to attend the grievance hearing notwithstanding that IDOC acknowledged it had been notified of the hearing <sup>3/</sup>. See G.O. Ex. 1 at 10.

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<sup>3/</sup> IDOC advised that it did not attend the hearing because the Director for the Jackson County Board had already stated his opinion that Complainant was fired for unjust, unsubstantiated reasons and it would, therefore, not be possible to have a fair  
(continued...)

The Jackson County Board, after hearing Complainant's presentation and having no evidence to rebut it, concluded that complainant was improperly discharged from his employment. G.O. Ex. 1, **Atch.** 5-L. The Governor's Office affirmed, noting that **IDOC's** refusal to participate or cooperate in the grievance, proceeding resulted in an entirely one-sided record which could lead to only one decision. In view of the absence of evidence in support of the reasons expressed for Complainant's discharge, I find that the Jackson County Board and the Governor's Office properly concluded that the discharge was not substantively justified.

## II. Relief.

None of the parties has excepted to the merits of the reinstatement and backpay orders and there is nothing in the record which demonstrates that reinstatement and backpay would be inappropriate in this case. <sup>4/</sup> Moreover, reinstatement is a

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### <sup>3/</sup>(...continued)

**and impartial hearing.** G.O. Ex. 1 at 10-11. While it is true that the Director **responded** with the above opinion at the request of the Governor's Office, it was qualified by the words "**at this time**" and was based almost entirely on Complainant's evidence because IDOC had failed to cooperate in the grievance process. Even if an impartial hearing could not have been obtained, which is by no means clear, IDOC may have benefitted by attending the hearing and producing evidence which could have been considered in the grievance process and before the **ALJ**.

<sup>4/</sup> Those remedies may be improper in cases where the procedural deprivations are essentially harmless error and the complainant's discharge is substantively justified. See County of Monroe, Florida v. United States Department of Labor, 690 F.2d 1359, 1362 (11th Cir. 1982); City of Boston v. Secretary of Labor, 631 F.2d 156, 161 (1st Cir. 1980); Armando Machado v. South Florida Employment and Training Consortium, Case No. 80-CETA-194, slip (continued...)

proper remedy because Complainant was a probationary employee whose employment was not limited to the duration of a particular CETA program. cf. Broome v. United States Department of Labor, **870 F.2d** 95, 101 (**3d Cir.** 1989) (no assurance **that** complainant would have been selected for available jobs **following** staff reduction); New York Urban Coalition v. United States Department of Labor, 731 **F.2d** 1024, 1032 (2d Cir. 1984) (backpay not proper where award went beyond time that CETA project ended); In the Matter of John Tibbetts and Richard Bremmer v. Vermont Comprehensive Employment and Training Office, CETA, Case Nos. **81-CETA-254, 81-CETA-255**, Slip op. at 9, Sec. Decision July 25, 1984 (when regional **councils** went out of existence, reason for complainant's employment also ceased to exist). Absent his improper discharge, Complainant would have become a permanent employee of the State of Illinois within one month. See In the Matter of City of Passaic, New Jersey. Program Agent, and Passaic County, New Jersey. Prime Sponsor, Case No. 78-CET-112, slip op. at 6, Sec. Decision April 25, 1990, aff'd, No. 90-3393 (3d Cir. Jan. 17, 1991); Armando Machado v. South Florida Employment and Training Consortium, Case No. 80-CETA-494, slip op. at 2, Sec.

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4/ (. . .continued)

**op.** at 3, Sec. Decision July 29, 1983; In the Matter of Ms. Blanche Field and the City of Boston, Case No. 77-CETA-102, slip **op.** at 1, Sec. Decision September 29, 1982. Both the grantee's program agent and the Governor's Office of Manpower and Human Development concluded on the merits that Complainant's discharge was improper. G.O. Ex. 1, Atchs. 5-L, M. The Grant Officer's final determination focuses on the procedural issue in its conclusion that there is no evidence to indicate that the termination violated either the Illinois personnel rules, the Act or the CETA regulations. G.O. Ex. 3.



Decision February 19, 1982 (as a regular employee, under Consortium's policies, rather than a CETA participant employee, complainant was entitled to reinstatement). Accordingly, the **ALJ's** holding that IDOC must offer Complainant reinstatement in the same or similar position with one month of probationary status remaining until he becomes eligible for certification under the Illinois civil service system should be affirmed. The **ALJ's** order that backpay less interim earnings is due from the date of discharge until the date reinstatement is offered also should be affirmed.

Both IDOC and IDCCA challenge the **ALJ's** order that backpay be disbursed within twenty days, contending that it is contrary to state law that requires these expenditures be made from special appropriations which take six to nine months to obtain. Exception of IDOC at 3; Exception of IDCCA. Although CETA and adjudications thereunder would normally preempt conflicting state laws, upon consideration of the parties' filings, I conclude that payment within nine months would reasonably satisfy the goals of the CETA program.

The Grant Officer has excepted to the **ALJ's** conclusion that the backpay award should not include interest and argues that interest should be awarded at the rate of ~~12%~~ from the date of violation to the date of payment. Grant Officer Exception; Grant Officer's Memorandum in Response at 8. IDCCA does not oppose the award of interest, but argues that the rate should vary to reflect the usual rate for the period involved rather than a high

fixed rate. IDCCA also asks for a cutoff date for any interest due. IDCCA Brief in **Opposition to Position of Grant Officer** at 1-2.

Interest is an appropriate part of a backpay award, the purpose of which is to make the aggrieved party whole. County of Monroe, 690 **F.2d** at 1362. It accrues until backpay is actually paid whether the delay is long or short. Donovan v. Sovereian Security, Ltd., 726 **F.2d** 55, 58 (2d Cir. 1984); In the Matter of Kenneth D. Taylor v. Hampton Recreation and Hampton Manpower Services, Case No. 82-CETA-198, slip op. at 10, Sec. Decision April 24, 1987. The proper rate of interest on backpay awards is a variable rate for the periods in question established under 26 U.S.C. § 6621. In the Matter of Tommie Broome v. City of Camden Employment and Training Administration, Case No. 80-CETA-253, slip op. at 17, Sec. Decision December 14, 1987, aff'd, Broome v. United States Department of Labor, 870 **F.2d** 95 (3d Cir. 1989).

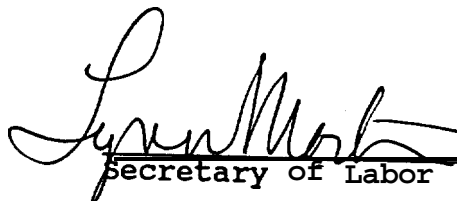
#### CONCLUSIONS AND ORDER

Accordingly, I propose to make the following conclusions and order:

The **ALJ's** determination that Complainant was improperly discharged is affirmed. Her orders of reinstatement and backpay also are affirmed. The order requiring payment of the backpay award within twenty days is modified to allow payment within nine months of the date of my final order. Interest is payable on the backpay at the rates established under 26 U.S.C. § 6621 (copy of applicable rates attached) from the date of discharge until the date of payment. IDOC and IDCCA are jointly and severally liable for all amounts due Complainant and no payments shall be made either directly or indirectly with Federal funds.

The parties may show cause within 40 days of receipt of this order why the above decision and proposed conclusions and order, should not be adopted as the final order in this case.

SO ORDERED.

  
Secretary of Labor

Washington, D.C.

# News Release

For Release: 11/8/89

## Department of the Treasury Internal Revenue Service

Public Affairs Division  
Washington, DC 20224

Media Contact: Tel. (202) 566-4024  
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IR-89-137

Washington -- The Internal Revenue Service today announced that interest rates for the calendar quarter beginning Jan. 1, 1990, will remain at ten percent for overpayments and eleven percent for under-payments.

under the Tax Reform Act of 1986, the rate of interest is determined on a quarterly basis, and the rate on underpayments is one percent higher than the rate on overpayments. The rate announced today is computed from the federal short-term rate based on daily compounding determined during October 1989.

Rev. Rul. 89-125, announcing the new rates of interest, is attached and will appear in Internal Revenue Bulletin No. 1989-48, dated November 27, 1989.

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Part I .

Section **6621.--** Determination of Interest Rate

26 **CFR.** 301.6621-1: Interest rate

Rev. **Rul.** 89-125

Section 6621 of the Internal Revenue Code establishes differential rates for allowance **of** interest on tax overpayments and assessment of interest on tax underpayments. Under section 6621(a)(1), the overpayment rate is the sum of the short-term federal rate plus 2 percentage points. Under section **6621(a)(2)**, **the** underpayment rate is the sum of the short-term federal rate plus 3 percentage points.

Section 6621(b)(1) of the Code provides that the Secretary shall determine the federal short-term rate for the first month **in** each calendar quarter.

Section 6621(b)(2)(A) of the Code provides that the federal short-term rate determined under section 6621(b)(1) for any month shall apply during the first calendar quarter beginning after such month.

Section 6621(b)(2)(B) **of** the Code provides that in determining the addition to tax under section 6654 for failure to pay estimated

**tax** for any taxable year, the federal short-term rate which applies during **the 3rd** month following such taxable year shall also apply during the first 15 **days of** the 4th month following such taxable year.

Section **6621(b)(3)** of the Code provides that the federal short-term rate for any month shall be the federal short-term rate determined during such month by the Secretary in accordance with section **1274(d)**, rounded to the nearest full percent (or, if a multiple of **1/2** of 1 percent, the rate shall be increased to the next highest full **percent**).

Notice 88-59, 1988-1 **C.B.** 546, announced that in determining the quarterly interest rates to be used for overpayments and **underpayments** of tax under section 6621 of the Code, the Internal Revenue Service will use the federal short-term rate based on **daily** compounding because that rate **is** most consistent with section 6621 which, pursuant to section 6622, **is** subject to daily compounding.

Rounded to the nearest full percent, the federal short-term rate based on daily compounding determined during the month **of** October 1989 is 8 percent. Accordingly, an overpayment rate of **10** percent and an underpayment rate of 11 percent is established for the calendar quarter beginning January 1, 1990. The rates apply to amounts bearing interest during that calendar quarter.

The 11 percent rate also applies to estimated tax underpayments for the quarter and for the first 15 days in April.

Interest factors for daily compound interest for annual rates

of 10 percent and 11 percent were published in Tables 16 and 17 of Rev. **Proc. 83-7**, 1983-1 C.B. 583, 599, 600.

Annual interest rates to be compounded daily pursuant to section 6622 of the Code that apply for prior periods are set **forth** in the accompanying tables.

**DRAFTING INFORMATION**

The principal author of this revenue ruling is Mary Jane **Kossar** of the Office Of the Assistant Chief Counsel (Income Tax & **Accounting.**) For further information regarding this revenue ruling contact **Mrs.** Kossar on (202) 566-3453 (not a toll-free call).

TABLE OF INTEREST RATES

PERIODS BEFORE JUL. 1, 1975 - DEC. 31, 1986

OVERPAYMENTS AND UNDERPAYMENTS

PERIOD	RATE	DAILY RATE TABLE IN 1983-1 C.B.
Before Jul. 1, 1975	6%	Table 2, pg. 586
Jul. 1, 1975--Jan. 31, 1976	9%	Table 4, pg. 588
Feb. 1, 1976--Jan. 31, 1978	7%	Table 3, pg. 587
Feb. 1, 1978--Jan. 31, 1980	6%	Table 2, pg. 586
Feb. 1, 1980--Jan. 31, 1982	12%	Table 5, pg. 588
Feb. 1, 1982--Dec. 31, 1982	20%	Table 6, pg. 588
Jan. 1, 1983--Jun. 30, 1983	16%	Table 22, pg. 605
Jul. 1, 1983--Dec. 31, 1983	11%	Table 17, pg. 600
Jan. 1, 1984--Jun. 30, 1984	11%	Table 41, pg. 625
Jul. 1, 1984--Dec. 31, 1984	11%	Table 41, pg. 625
Jan. 1, 1985--Jun. 30, 1985	13%	Table 19, pg. 602
Jul. 1, 1985--Dec. 31, 1985	11%	Table 17, pg. 600
Jan. 1, 1986--Jun. 30, 1986	10%	Table 16, pg. 599
Jul. 1, 1986--Dec. 31, 1986	9%	Table 15, pg. 598

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 - PRESENT

	OVERPAYMENTS			UNDERPAYMENTS		
	RATE	TABLE	PG.	RATE	TABLE	PG.
Jan. 1, 1987--Mar. 31, 1987	8%	14	597	9%	15	598
Apr. 1, 1987--Jun. 1, 1987	8%	14	597	9%	15	598
Jul. 1, 1987--Sep. 30, 1987	8%	14	597	9%	15	598
Oct. 1, 1987--Dec. 31, 1987	9%	15	598	10%	16	599
Jan. 1, 1988--Mar. 31, 1988	10%	40	624	11%	41	625
Apr. 1, 1988--Jun. 1, 1988	9%	39	623	10%	40	624
Jul. 1, 1988--Sep. 30, 1988	9%	39	623	10%	40	624
Oct. 1, 1988--Dec. 31, 1988	10%	40	624	11%	41	625
Jan. 1, 1989--Mar. 31, 1989	10%	16	599	11%	17	600
Apr. 1, 1989--Jun. 30, 1989	11%	17	600	12%	18	601
Jul. 1, 1989--Sep. 30, 1989	11%	17	600	12%	18	601
Oct. 1, 1989--Dec. 31, 1989	10%	16	599	11%	17	600
Jan. 1, 1990--Mar. 31, 1990	10%	16	599	11%	17	600



CERTIFICATE OF SERVICE

Case Name: In the Matter of Terry O'Boyle  
Case No. : 79-CETA-181  
Document : Decision and Order to Show Cause

A copy of the above-referenced document **was** sent to the following persons on ~~JUN - 4 1991~~.

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